Chapter 6:
Copies

A. Right to Copies

SG §10-620 grants any person who has the right to inspect a public record the right to be furnished copies, printouts, or photographs for a reasonable fee. If the custodian does not have the facilities to reproduce a record, the applicant should be granted access to make a copy. A copy of a court judgment may not be provided, however, until the time for appeal has expired or until an appeal has been adjudicated or dismissed. SG §10-620(a)(3). This provision should be applied only to non-litigants, since the Maryland Rules of Procedure require copies to be furnished to litigants. See Memorandum to Clerks of the Circuit Courts from Assistant Attorney General Catherine M. Shultz (July 27, 1983). Another exception pertains to written promotional examinations: while certain individuals may review the examination and results after the examination has been graded, they are not entitled to a copy. SG §10-618(c)(2).

B. Format

With the exception of records stored in electronic format (addressed in Part C below), the PIA has not generally addressed the format in which copies should be provided. (The Legislature had designated the Department of Legislative Services as the "sole determiner" of the form in which records of the General Assembly are released in response to a PIA request, SG §2-1249.) Nor have the Maryland courts resolved whether the right to copies includes the right to pick the format in which records are copied. Federal authority decided before 1996 under FOIA, as well as some out-of-state authority, held that the agency, not the requester, has the right to select the format of disclosure. See E. S. Dismukes v. Department of the Interior, 603 F. Supp. 760 (D.D.C. 1984); Chapin v. Freedom of Info. Comm., 22 Conn. App. 316, 577 A.2d 300 (1990). In the past this Office adopted a similar position. Nonetheless, to further the PIA's general purposes, agencies should voluntarily accede to the requester's choice of format unless doing so imposes a significant, unrecoverable cost or other burden on the agency. See 56 Opinions of the Attorney General 461 (1971); letter of advice to Sheriff Earnest Zaccanelli, Prince George's County Sheriff's Department, from Assistant Attorney

General Emory A. Plitt, Jr. (June 27, 1983); Letter of Advice to F. Carvel Payne, Director, Department of Legislative Reference from Assistant Attorney General Kathryn M. Rowe, (January 9, 1995) (PIA does not require that the requested information be given in any particular form).

C. Format of Copies of Electronic Records

Under the Electronic Freedom of Information Act Amendments of 1996, a federal agency must provide a record in the format requested if the record is readily reproducible in that format. 5 U.S.C. §552(a)(3)(B). See O'Reilly, Federal Information Disclosure §7:37 (3d ed. 2000). Until recently, the PIA had no similar express requirement.

In 2011, the General Assembly amended the PIA to provide a requester with a right to obtain a copy of an electronic record in a "searchable and analyzable electronic format" in specified circumstances. SG §10-620(a)(2). The law sets forth certain key conditions:

> (1) The public record must exist in a "searchable and analyzable" format;
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> (2) the requester must explicitly request the copy in a searchable and analyzable format; and
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> (3) the custodian must be able to produce the copy without compromising material that is exempt from disclosure.

SG §10-620(a)(2)(i). The statute does not define "searchable and analyzable electronic format." However, the phrase is likely meant to obligate agencies to provide records in formats that can be searched and manipulated when the requester seeks such capabilities and the agency can readily remove any exempt material. A custodian is not required to release a record in a format that would somehow compromise the security or integrity of the original record or of any proprietary software – generally, a rare possibility. SG §10-620(a)(2)(iv)4.

When the Legislature created this presumptive right to an electronic copy of an electronic record, it also authorized custodians to remove certain information, known as "metadata," from the copies that are provided, regardless of whether the metadata is otherwise exempt from disclosure. SG §10-620(a)(2)(iii). "Metadata" – literally, data about data – is information in an electronic record that is generally not visible but is

often readily accessible in particular formats. Metadata sometimes contains exempt material – for example, the metadata for a word processing document may include prior drafts, editorial comments, suggestions by reviewers, and other material that may be exempt as part of a pre-decisional deliberative process. See Chapter 3.D.1. above. But other metadata may be relatively innocuous material not covered by any exemption. For example, it may record each time the record was opened or edited. The invisible nature of metadata has made it a matter of concern to custodians.

The PIA defines metadata as follows:

> (1) "Metadata" means information, generally not visible when an electronic document is printed, describing the history, tracking, or management of the electronic document, including information about data in the electronic document that describes how, when, and by whom the data is collected, created, accessed, or modified and how it is formatted.
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> (2) "Metadata" does not include:
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> (a) a spreadsheet formula;
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> (b) a database field;
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> (c) an externally or internally linked file; or
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> (d) a reference to an external file or hyperlink.

SG §10-611(d).

This definition thus broadly defines "metadata" but also limits it. The statute permits a custodian to remove metadata from the copy of an electronic record provided to a requester by means of a software program or by converting the electronic record to a different searchable and analyzable format without the metadata. SG §10-620(a)(2)(iii). The definition of metadata, with its very specific exceptions, and the authorization to remove metadata from copies appear to be a legislative effort to create a presumptive right for a requester to a usable electronic copy and, at the same time, to provide some comfort to a custodian who wishes to avoid the inadvertent production of exempt materials in invisible metadata.

The 2011 law requiring agencies to provide electronic copies in certain circumstances was passed with a "sunset" provision. That provision will result in repeal of the 2011 amendments in October 2013 if the General Assembly does not take further action in the interim. Chapter 536, Laws of Maryland 2011. Such action could involve a revision of the provisions concerning electronic records, or could simply consist of a repeal of the sunset provision itself – with the result that the electronic copy provisions would remain viable.